Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

In the Matter of	)	
	)	
Interagency Working Group on	)	FTC Project No. P094513
Food Marketed to Children:	)	
General Comments and Proposed	)	
Market Definitions	)	

COMMENTS

OF

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July 14, 2011

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Viacom Inc. ("Viacom") hereby respectfully submits these comments in response to the report on Preliminary Proposed Nutritional Principles to Guide Industry Self-Regulatory Efforts issued by the Interagency Working Group on Food Marketed to Children (the "Federal Working Group").[1] While Viacom long has participated in national efforts to promote healthy lifestyles for children, principally through its Nickelodeon networks, the *Interagency Report* would have a dramatic impact on Viacom's ability to continue to invest in high quality programming, including programming intended for adults. Despite its purported "voluntary" nature, the *Interagency Report* violates the free speech and due process rights of advertisers, media companies and program producers.

Viacom therefore urges the Federal Working Group to withdraw its "recommendation" to restrict food marketing for adolescents and submits that, given the lack of evidence linking advertising to childhood obesity, there is no basis for replacing self-regulatory efforts with government guidelines when it comes to children under age 12. Before making recommendations to Congress, the Federal Working Group should at least identify the scientific

[1] *See* Interagency Working Group on Food Marketed to Children, *Preliminary Proposed Nutritional Principles to Guide Industry Self-Regulatory Efforts*, Request for Comments (issued Apr. 28, 2011) (the "*Interagency Report*").

basis for its proposals, conduct a comprehensive analysis of the costs and benefits of government action, and pay substantially closer attention to the serious constitutional implications of this undertaking.

I. INTRODUCTION & SUMMARY

Viacom is a leading global entertainment company that strives to deliver compelling television, motion picture and digital media content that connects with its worldwide audiences. Viacom represents MTV Networks, including popular cable television networks such as Nickelodeon, MTV, VH1, Nick at Nite, Comedy Central, CMT, Spike, TV Land and Logo, as well as BET Networks, which programs cable television networks BET and Centric, and Paramount Pictures Corporation, America's oldest running movie studio and home to the *Transformers, Star Trek, Indiana Jones* and *Mission Impossible* franchises. Viacom also is home to popular digital media brands, including MTV.com, Nick.com, Neopets.com, Shockwave.com, Monkeyquest.com and Teennick.com.

As a leading creator and provider of programming popular with children and adolescents, as well as adults, Viacom has a keen interest in the Federal Working Group's efforts, particularly because the *Interagency Report* threatens to cause vast unintended consequences that would dramatically reduce revenues, harming the company's ability to invest in high quality programming and job creation. Viacom urges the Federal Working Group to reconsider its proposals with a more conscientious eye toward how deeply invasive its plan would be and how much disruption its food marketing restrictions would cause to media companies – all without a corresponding benefit to the health and well-being of children and adolescents.

Viacom has a long history of promoting national efforts to combat childhood obesity, and supports the Federal Working Group's over-arching goals of promoting children's health. Viacom disagrees strongly, however, with the government's proposed methods. The

Interagency Report menacingly jeopardizes advertising revenues – the lifeblood of media companies – with disregard for the scope of the havoc that the Federal Working Group's proposals would cause. In particular, the food marketing proposals would severely curtail the ability of Viacom and other media companies to generate sufficient revenue to continue to invest in high quality programming. Without any government mandate – in fact, because of a light regulatory touch – Viacom has created multiple cable networks that serve kids, from pre-school to tweens to teenagers, plus distribution on new media platforms. Viacom also serves adult audiences, and all these investments are sustained primarily through advertising revenues. If these revenues are threatened by government restrictions, and media companies are forced to reevaluate their ability to invest in content, the harm to children, adolescents, families and adults would be significant.

Viacom urges the Federal Working Group to fulfill its Congressional mandate by actually studying the marketing of food to children, including identifying peer reviewed science demonstrating a causal relationship between food advertising and obesity in children and adolescents (if any), before submitting recommendations to Congress. The most important survey of the major research in the area of food marketing to children and adolescents was prepared by the prestigious Institute of Medicine ("IOM") in 2005 at the request of Congress. IOM concluded, "[t]here is presently insufficient causal evidence that links advertising directly with childhood obesity and that would support a ban on all food advertising directed to children."[2] IOM also concluded that "[a] ban may not be feasible due to concerns about

[2] Jeffrey P. Kaplan, et al., *Preventing Childhood Obesity, Health In the Balance*, Institute of Medicine (2005), at 174.

infringement of First Amendment rights and the practicality of implementing such a ban."[3] In 2006, IOM reported that the evidence was insufficient on whether television advertising influenced the diets of adolescents,[4] and the Federal Working Group acknowledged that it "is unaware of studies concluding whether or not [social media and Internet] marketing is any more successful in influencing adolescents' food choices than traditional advertising."[5]

It is no defense to suggest, as does the *Interagency Report*, that these restrictions are merely voluntary. The Federal Working Group's plan is nothing short of an obligatory speech restriction masquerading as an effort to induce voluntary behavior. When proposals this deeply intrusive are issued by multiple agencies of the Federal government, accompanied by not-too-subtle threats of more onerous action, they bear the distinct imprimatur of government coercion. Rational, publicly-traded, government regulated businesses cannot risk disobedience.

As a consequence, in addition to the substantial public policy threats posed by the *Interagency Report*, the marketing restrictions run afoul of the First and Fifth Amendments to the Constitution. Viacom has retained a constitutional law expert, Professor Kathleen Sullivan, to evaluate the constitutional implications of the Federal Working Group's efforts to restrict food marketing. In her attached report, Professor Sullivan concludes that "government may not regulate truthful commercial speech unless its means are narrowly tailored" – a "test that any effort to stop childhood obesity by regulating speech must fail."[6] Indeed, the Supreme Court

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3 *See id.*

4 *Interagency Report* at 17 (*citing Food Marketing to Children and Youth: Threat or Opportunity?*, Institute of Medicine (2006), at 306-309).

5 *Interagency Report* at 17.

6 *The Interagency Working Group's Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts: Constitutional Issues*, Professor Kathleen M. Sullivan, July 14, 2011, at 1 (the "Sullivan Report") (attached as Appendix A hereto).

long has recognized that coercive government action that chills the exercise of free speech rights violates core First Amendment principles. By attempting to limit speech, rather than use its considerable direct powers to address childhood obesity, the Federal Working Group's actions stand in direct "violation of the basic First Amendment principle that regulation of speech, including commercial speech, should be a last, not a first, resort for government action."[7] Courts likewise have long acknowledged that speech limitations cannot evade constitutional scrutiny merely because they purport to protect children, when the consequence of government action would burden content that adults are legitimately entitled to receive. Government intimidation and pressure of the sort evidenced here also violate the due process clause of the Fifth Amendment.

For all of these reasons, and in light of President Obama's recent executive order directing all Federal agencies to make regulatory decisions only after undertaking a full cost/benefits analysis,[8] Viacom urges the Federal Working Group to withdraw its "recommendation" to restrict food marketing for adolescents aged 12-17 and defer to self-regulation with respect to food marketing for children aged 2-11. Before submitting a final report to Congress, the Federal Working Group should at least identify the scientific basis for its proposals and pay substantially closer attention to the constitutional implications of this undertaking.

II. INTERAGENCY REPORT BACKGROUND

In the 2009 Omnibus Appropriations Act, Congress directed four federal agencies – the Federal Trade Commission (FTC), the Food and Drug Administration (FDA), the Centers

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7 *Id.*

8 *See Executive Order – Regulation and Independent Regulatory Agencies*, President Obama (rel. July 11, 2011).

for Disease Control and Prevention (CDC) and the U.S. Department of Agriculture (USDA) – to create an Interagency Working Group on Food Marketed to Children. The law states that "[t]he Working Group is directed to conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children."[9]

On April 28, 2011, the Federal Working Group released a request for comments on its "Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts." The Federal Working Group proposed to require that all foods marketed to children (1) contain ingredients that make a "meaningful contribution to a healthful diet," and (2) "minimize the content of nutrients that could have a negative impact on health or weight."[10] Any food that fails a combination of these two standards shall not be marketed, advertised or promoted in any manner to children aged 2-11 or via social media or in schools for adolescents aged 12-17.[11]

Viacom takes no position with regard to the proposed nutritional guidelines (as nutritional expertise is not a core competency of a media company). Viacom does object, however, to marketing restrictions based on these or other nutritional guidelines because science simply does not support the Federal Working Group conclusion that food marketing causes childhood obesity. Ignoring this lack of evidence, the Federal Working Group proposes to define the restricted marketing activities "broadly . . . to encompass virtually all kinds of promotional activities directed to youth."[12] The restrictions put at risk revenue for Viacom's television,

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[9] Omnibus Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84.

[10] *Interagency Report* at 15.

[11] *See id.* at 18-19.

[12] *Id* at 18.

Internet, licensing and movie businesses, which will directly impact investment in content, with no proof children will see any health and wellness benefit or reduction in obesity.

III. VIACOM IS AN IMPORTANT PARTNER IN THE FIGHT AGAINST CHILDHOOD OBESITY AND A WORLDWIDE LEADER IN PROMOTING HEALTHY LIFESTYLES FOR CHILDREN

A. Viacom Has Developed Comprehensive Partnerships to Promote Health and Wellness for Children

Fueled by world-class brands, Viacom serves an ever-growing population of kids, tweens, teens and adults by providing their favorite media and entertainment on a variety of platforms and devices, 24 hours per day/seven days per week. According to Nielsen, about 20% of all U.S. advertising-supported cable television viewing can be attributed to Viacom networks. Because a substantial portion of its audience consists of younger Americans, Viacom – through its MTV Networks Kids & Family Group, which includes top-ranked children's network Nickelodeon, Nicktoons, Nick Jr. and TeenNick – has long taken seriously its self-imposed duty to promote the pro-social needs of children. Viacom's adult-directed MTV Networks groups and BET Networks also have worked hard to cultivate a series of initiatives designed to encourage healthy lifestyles. Both on television and off, Viacom's brands have an unparalleled record of commitment to social responsibility in communities across the country.

These initiatives, which are merely exemplary of Viacom's ongoing efforts, include:

> **The Big Help Health & Wellness** – "*The Big Help*" is a global, multiplatform pro-social initiative designed to empower kids to take action on issues that are important to them. The campaign focuses on four key areas – health and wellness, education, community service, and the environment – and aims to connect kids with tools and information to help them become positive agents of change in their communities. Since April 2010, more than 1 million children have logged 5 million healthy actions at Nickelodeon's "*The Big Help*" website. In 2010, *The Big Help* awarded $1 million in grants to schools, communities and non-profit organizations. In fact, since 2005 more than $3.4 million in kid-driven grants have been made to schools and afterschool programs targeting fitness and nutrition programs in more than 530 communities.

Worldwide Day of Play – For more than 10 years, Nickelodeon has championed health and wellness for children. The original "*Let's Just Play*" initiative helped kids make healthy lifestyle choices and combat childhood obesity. The campaign expanded over the years to include more public affairs outreach. Each year, health and wellness efforts culminate on "*Worldwide Day of Play*," when Nickelodeon literally "goes dark" and suspends all programming on its television networks and web sites for an afternoon to encourage kids to go outside and be active. Over the years, Nickelodeon has hosted more than 20,000 local events on *Worldwide Day of Play* to engage communities in the cause. On September 24, 2011, Nickelodeon will host the 8th annual *Worldwide Day of Play* in Washington, D.C. in partnership with the President's Council on Physical Fitness and the National Park Service in support of Let's Move! The event will take place on the Ellipse, which will serve as "national headquarters" with a family-friendly activity zone with the best in professional and youth sports, health and wellness and community-based organizations.

Family Table – Nick at Nite's Family Table promotes the healthy social and educational benefits that result from families dining together. Family Table encourages viewers, many of whom are parents with school-aged children, to dine regularly as a family and "share more than meals."

Viacom has been equally active in developing public and private partnerships to reinforce these efforts, including:

Let's Move! Campaign with First Lady Michelle Obama – In 2010, Nickelodeon, BET, CMT and MTV Tr3s joined First Lady Michelle Obama's "Lets Move!" campaign as founding partners. The channels produce and air public service announcements featuring the First Lady and health and wellness messaging. The "Lets Move!" campaign aims to solve the problem of childhood obesity within a generation by combining comprehensive strategies with common sense. The goal is to put children on the path to a healthy future during their earliest months and years, by giving parents helpful information and fostering environments that support healthy choices; providing healthier foods in schools; ensuring that every family has access to healthy, affordable food; and helping kids become more physically active.

Million Presidential Active Lifestyle Award (PALA) Challenge – Nickelodeon's "*The Big Help"* campaign is partnering with the President's Challenge, the premier program of the President's Council on Fitness, Sports and Nutrition to help promote the Presidential Active Lifestyle Award (PALA) Challenge. Nickelodeon is promoting the "Million PALA Challenge," with a goal of encouraging millions of Americans to sign up for and achieve the Award by the *Worldwide Day of Play* in September 2011, with an on-air and online announcements that will encourage kids to get up and get active.

Alliance for a Healthier Generation with the Boys & Girls Clubs of America, the National PTA and Clinton Foundation – Nickelodeon has partnered with the Boys & Girls Clubs of America, the National PTA, the W.J. Clinton Foundation and the

American Heart Association's Alliance for a Healthier Generation to build a national grassroots infrastructure for kids to be leaders in making healthy lifestyle choices in their homes, schools and communities.

H.E.A.L. Academy/Summer Camp for Girls – Through the BET Foundation, BET has sponsored the Health Education & Active Learning ("H.E.A.L.") Academy, an after-school curriculum to empower African-American girls ages 10-17 with the skills and knowledge to make healthy lifestyle choices. The program aimed to reverse the epidemic of childhood obesity by training participants to become healthy lifestyle advocates in their communities and peer-group champions for nutrition, physical activity and obesity prevention lifestyles. Through its corresponding Fit, Flourishing & Fly Girls Empowerment Summit, the H.E.A.L. program also aimed to instill healthy living habits in younger girls ages 9-13. Data gathered through the program was used to track the rates of obesity and other related health disparities in those cities where H.E.A.L. sites were located. BET also has offered a Summer Camp for Girls – a residential camp program to provide African-American girls ages 10-12 with the knowledge and skills to make healthy lifestyle choices. Through a series of fun, age-appropriate activities, the program addressed childhood obesity and taught girls about nutrition, fitness, positive thinking and self-responsibility. Participants took part in nutrition seminars, daily exercise, sports, creative and therapeutic arts, group and one-on-one guidance counseling and age-appropriate play activities.

B. Viacom is Committed to Responsible Food Marketing to Children

Viacom also acts responsibly in ensuring that its on-air networks and its popular characters reflect appropriate consideration for the influence that they have on children. Thus, the company voluntarily has committed itself and its brands to promoting a wide variety of health and wellness messages. Viacom networks devote extensive resources to disseminating and reinforcing positive information to its audiences. Numerous programs have addressed the health and wellness concerns of adolescents. Examples include MTV's *I Used to Be Fat*, *Teen Mom, 16 and Pregnant* and *True Life*, VH1's *Celebrity Fit Club*, Logo's *Logo Docs*, and Nickelodeon's *Nick News with Linda Ellerbee*, *Let's Just Play Go Healthy Challenge* and *Lazy Town*. The company also applies strict restrictions to its licensing of the iconic characters that children around the world have come to love and respect.

Viacom's commitment to responsible food marketing begins with its support of the Children's Advertising Review Unit ("CARU") and the Children's Food and Beverage

Advertising Initiative ("CFBAI"), both of the Council of Better Business Bureaus ("CBBB"). CARU evaluates child-directed advertising and promotional material in all media, including food marketing, to advance truthfulness, accuracy and consistency with the program's age appropriate guidelines and relevant laws. CFBAI participants include 17 of the largest food and beverage manufacturers in the world. The program encourages healthier dietary and lifestyle choices for children by establishing meaningful nutritional standards for the marketing of foods to children. In July 2011, the CBBB announced a "groundbreaking agreement that will change the landscape of what is advertised to kids by the nation's largest food and beverage companies," who in the future will follow uniform nutrition criteria designed by top food industry scientists and nutritionists for foods advertised to children.[13]

Viacom also announced in 2007 that it would limit the licensing of Nickelodeon characters to food packaging that meets "better for you" criteria as established by its partners in accordance with governmental dietary guidelines.[14] This policy became effective with all new agreements beginning in 2009. Some examples of Nickelodeon's "better for you" licensing deals have included SpongeBob Carrots and Spinach; SpongeBob and Dora clementines, mandarin oranges and tangelos; Dora and Diego peaches, plums, and nectarines; and SpongeBob and Dora frozen edamame.

Moreover, Nickelodeon commits tens of millions of dollars in company resources annually to health and wellness. This has included long-form programming devoted to these issues (such as the *Let's Just Play Go Healthy Challenge* featuring the Alliance for a Healthier

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[13] *Council of Better Business Bureaus Announces Groundbreaking Agreement On Child-Directed Food Advertising*, Press Release, Council of Better Business Bureaus (July 14, 2011).

[14] Nickelodeon continues to allow its characters to be used on a limited number of seasonal treats, such as Halloween candy.

Generation, a half hour television series that followed children as they challenged themselves to eat better and exercise; *LazyTown*, a series that was devoted exclusively to health and wellness; and *Nick News with Linda Ellerbee*, which informs kids about current affairs including obesity, food labeling and nutrition) and short-form messaging (such as the daily messaging through "The Big Help" on fitness and nutrition). For a decade, Nickelodeon has produced and aired PSA messages devoted to engaging kids and parents on health and wellness as an on-going public affairs priority. Several of these on-air PSA campaigns have featured prominent figures such as former President Bill Clinton, Governor Mike Huckabee and pro football player Tiki Barber. In 2011, two of Nickelodeon's most popular shows, *Dora the Explorer* and *Degrassi*, will feature health and wellness as central themes in upcoming storylines and episodes.

MTV also focuses on health and wellness messaging in programs intended for teens and adults. In October, the network expects to debut a new series, *Chelsea Settles*, which will follow the highs and lows of a young woman who, at 325 pounds, embarks on the biggest journey of her life – to take control of her weight and get healthy. MTV's *True Life* series also has featured episodes dealing with healthy lifestyle issues, including 2010's *I'm Addicted to Food*. And the series *Made* has presented storylines about teens fighting against obesity and for healthier bodies. In 2006 and 2007, MTV telecast the specials *Fat Camp* and *Return to Fat Camp*, which followed teens who attended weight-loss camp and provided a day-to-day look at their struggles to turn their lives around.

Viacom has undertaken all of these efforts on a purely voluntary basis, not under threat or duress. The best hope to connect with children and succeed in promoting healthier choices continues to be the truly voluntary best practices of Viacom and conscientious food and beverage marketers.

IV. THE FEDERAL WORKING GROUP'S MARKETING RESTRICTIONS WOULD HARM CHILDREN'S PROGRAMMING AND IMPOSE SEVERE BURDENS ON PROGRAMMING LAWFULLY INTENDED FOR ADOLESCENTS AND ADULTS

A. Marketing Restrictions Will Unduly Harm Programming Intended for Children

As demonstrated above, Viacom is a strong supporter of the Federal Working Group's over-arching goal of promoting children's health through better diet. Viacom is extremely concerned, however, about the methods that the *Interagency Report* advocates for achieving these goals. Viacom takes no position with regard to proposed nutritional guidelines, but the company does believe that it has an important perspective to share regarding the harmful impact that additional marketing restrictions would have on programming intended for children, adolescents and adults.

Viacom's family-oriented businesses are a testament to the ability and willingness of the private sector to behave responsibly while serving the needs of children and families. Without any government requirement or mandate, Viacom has invested to grow Nickelodeon from a single channel to four networks plus distribution on the Internet, mobile phones, video on-demand and elsewhere. No rule or regulation ever compelled the company to supply this amazing array of children's content. In fact, it has been a light regulatory touch that has helped produce the incredible competition and options that characterize today's vibrant children's media landscape, which now includes Viacom's Nickelodeon, Nicktoons, Nick Jr. and TeenNick, as well as PBS Kids Sprout, Disney Channel, Disney Jr., Disney XD, Time Warner's Cartoon Network and Boomerang and Discovery's The Hub.

Perhaps the best example of the innovation that a light-touch regulatory environment has produced is Nick Jr., Viacom's network geared to preschool children. Literally every program that appears on Nick Jr., 24 hours each day, is designed to serve the educational

and informational needs of preschool children and is presented without paid commercials.[15] Nick Jr. program offerings include such popular and critically-acclaimed series as *Dora the Explorer*, *Team UmiZoomi*, *NiHao Kai-Lan*, *Bubble Guppies* and *Go, Diego, Go*.

This commitment does not come without cost, however. Like nearly all television programming networks, each of Nickelodeon's channels other than Nick Jr. depends extensively upon advertising revenues to support the creation, acquisition and production of compelling, high quality content. And the revenues generated by its advertiser-supported channels help support Viacom's ability to continue to offer Nick Jr. without paid commercials.

Across all of its children's networks, Viacom puts hundreds of hours of research and testing into producing its children's programs. For its educational/information programming, the company develops plots with the expertise of child development experts and educators. It employs consultants to ensure that curriculum goals are appropriate for the target audiences and those educational concepts are effectively presented. Shows are thoroughly tested and screened by panels of children as part of the research process. Consequently, the programming is expensive. A single half-hour episode of popular programming series, for example, can cost more than $700,000 to produce.

If the *Interagency Report* results in further restricting the amount and variety of advertising available to support children's television programming, media companies inevitably would have to recalibrate their financial commitment to these types of programs and networks. The harm that would be inflicted on families, and children in particular, would be significant. If the food advertising categories diminish substantially or disappear altogether, media companies

[15] Nick Jr. does include promotional announcements for Nickelodeon-licensed merchandise as well as a handful of on-screen billboards each hour announcing sponsorship support (akin to those aired on PBS television stations).

will be hard pressed to replace that revenue with other advertising categories, inevitably leading to reduced investment in programming, a loss of jobs and slower job growth. Conservatively assuming a mere 20% reduction in advertising by food marketing spending by advertisers – and the *Interagency Report* certainly could result in a more substantial drop – economic consulting firm IHS Consulting recently estimated that the Federal Working Group proposals would result in a *$28 billion* decrease in food manufacturing and retail revenues, a $1.9 billion drop in advertising spending and, most importantly, *the loss of 74,000 jobs* – all in 2011 alone.[16] It would be particularly unfortunate if the government impels these draconian results when private industry has shown a commitment to addressing the very concerns raised by the Federal Working Group.

To be clear, Viacom is not suggesting that there should be no standards with respect to advertising intended to reach children. Rather, Viacom believes that existing industry efforts are sufficient to monitor and regulate advertising so that children are exposed only to truthful, age-appropriate messaging, including with respect to food marketing and healthy lifestyles. Indeed, as noted above, Viacom supports both the CARU and CFBAI self-regulation initiatives administered by the CBBB. Combined, these initiatives ensure that food marketing to children under age 12 includes healthier dietary choices, promotes healthy lifestyles and is truthful and age-appropriate. The CFBAI initiative – now in its 6th year – is capable of supporting, and is in fact already achieving, the Federal Working Group's goals. In 2010, children under 12 saw 50% fewer ads on television of food and beverage products than they did

[16] *See* Economic Impact Assessment, *Assessing the Economic Impact of Restricting Advertising for Products That Target Young Americans*, IHS Consulting (released July 7, 2011). The group estimates that cumulative lost sales from 2011 through 2015 would be $152 billion, while cumulative lost person years of work would be 378,000. *See id.*

in 2004, according to an analysis of Nielsen data prepared by Georgetown Economic Services.[17] A 2007 report from the FTC Bureau of Economics showed that children were exposed to fewer food ads on television in 2004 than they were in 1977.[18] These trends continue in 2011 and there simply is no need for government interference.

B. Marketing Restrictions Will Severely Burden Programming Lawfully Intended for Adolescents and Adults

Aside from the potential to impede investment in children's programming, including programming and pro-social initiatives that promote health and wellness, additional restrictions on food marketing could have a seismic affect on programming lawfully intended for adolescents and adults. Like children's programming, adolescent and adult-targeted content on Viacom's networks depends heavily upon support from advertising. Specifically, the *Interagency Report* indicates that – at least for measured media such as television – marketing restrictions could be applied to adolescents ages 12-17 whenever they comprise a 20% or greater share of a particular network's audience.[19] Nearly all programs on Nick-at-Nite, TeenNick, MTV, MTV2 and MTV Tr3s meet the 20% 12-17 year old threshold and many programs on VH1, BET and Comedy Central do. With less revenue to support these programs, Viacom (just like other media companies) would find it increasingly difficult to continue making the types of investments necessary to support programming desired by older audiences.

The *Interagency Report* proposes to define "what constitutes food marketing to children" by relying on definitions set forth in a 2006 FTC study, which it says "has already been

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[17] *See New Research Shows Dramatic Changes in food and Beverage Ads Viewed by Children*, News Release of Grocery Manufacturers Association and the Association of National Advertisers (*citing* study by Georgetown Economic Services) (released April 28, 2011).

[18] *See Children's Exposure to Television Advertising in 1977 and 2004: Information for the Obesity Debate*, FTC Bureau of Economics Staff Report (released June 1, 2007).

[19] *Interagency Report* at 18.

vetted through public comment."[20] And while the Federal Working Group claims that 44 companies provided data to the FTC to inform its 2006 conclusions,[21] it is important to note that media companies such as Viacom were not among those companies. Thus, the *Interagency Report* incongruously proposes a definition that would have sweeping breadth and scope – with a manifestly adverse effect on the media industry – without ever before considering information from media companies about the potential impact of the proposed standards. Viacom submits that the Federal Working Group's obliviousness to the impact of its proposal presents grave risk to the media marketplace.

To its credit, the Federal Working Group at least asks now about the "disadvantages" of its proposed objective audience measurement test.[22] The *Interagency Report* indicates that the 20% threshold was chosen because this represents an audience share "that is approximately double the proportion" of the relevant age group compared to the general population.[23] From this, the Federal Working Group extrapolates that a 20% test would capture programming targeted to adolescents, while theorizing that it would not capture "substantial amounts of adult fare that happen to have some young people in the audience."[24]

Viacom submits that the Federal Working Group is woefully mistaken in underestimating the impact that its proposed definition would have on adults. It should be obvious that, if a network has an audience share comprised 20% of children or adolescents under

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[20] *Id.* at 16-17 (*citing Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation, A Report to Congress*, Federal Trade Commission (released July 2008)).

[21] *Interagency Report* at 16, note 44.

[22] *Id.* at 24.

[23] *Id.* at 18.

[24] *Id.*

age 18, it would have an audience share comprised 80% of adults. Thus, under the guise of protecting children, the Federal Working Group would adversely affect countless programs and networks whose audiences overwhelmingly are comprised of adults.

In fact, numerous Viacom networks focus primarily or exclusively on reaching adult viewers or adolescents over the age of 12. Nick-at-Nite, TeenNick, MTV, MTV2 and MTV Tr3s, together with VH1, BET and Comedy Central, all telecast programming targeted to adults and teenagers. Even TeenNick, which is designed to be attractive to adolescents, provides programming suitable for teenagers but not intended for younger children. The proposed marketing restrictions, to the extent that they would rely upon a 20% audience test, would put in great financial peril content and programming networks that by no reasonable standard would be considered "intended" for children.

Linking the proposed restrictions to audience ratings also would inject financial risk into the production of programming, therefore resulting in a higher cost of capital and fewer resources available to produce content. Even a company that targets an adult audience would have to take into account the possibility that, if its programs attract even a modest teenage audience, certain categories of advertisers simply would be off limits. Producers as a result would be compelled to skew some programming to an even older group, so that on average more than 80% of the audience is likely to remain adult. In other words, the Federal Working Group's proposals would interfere dramatically with creative choices and with media companies' business models. At the same time, because ratings are not known until after a program is telecast, cautious companies may perversely feel compelled to invest more resources in adult-oriented programming, in contravention of Federal goals of increasing the amount of high-quality programming intended for children.

Even more troubling, the Federal Working Group contemplates restrictions based on these definitions even though it acknowledges the "developmental differences between adolescents and children and, in particular, differences in how different age groups understand and respond to specific marketing techniques."[25] Having recognized that adolescents are more capable of processing marketing messages given their advanced development, it make little sense for the Federal Working Group to plow ahead with efforts to try to limit the messages to which they are exposed. Equally significant, the *Interagency Report* fails to identify any scientific evidence that marketing restrictions actually would have any impact on adolescent health or obesity. Accordingly, Viacom urges the Federal Working Group to abandon completely its consideration of restricting food marketing for children 12 years old and older. At the very least, before proceeding along this path, let alone making recommendations to Congress, the Federal Working Group should identify the scientific basis for its proposals and conduct a comprehensive analysis of the costs and benefits of government action. If it were to do so here, it surely would come to realize that the potential harms to adults outweigh the need to protect adolescents.[26]

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[25] *Interagency Report* at 17. For this reason, the *Interagency Report* suggests that the Federal Working Group is at least considering limiting its restrictions on food marketing, with respect to adolescents, to in-school marketing and social media. *See id.* The report nonetheless proceeds to discuss in detail the objective audience share criteria, rendering its consideration of a more limited approach as little comfort to media companies in the cross-hairs.

[26] In any event, as explained below, a government imposition on speech cannot survive constitutional scrutiny in the absence of this type of analysis. *See infra*, Section V.

V. GOVERNMENT RESTRICTIONS ON FOOD MARKETING VIOLATE THE FIRST AMENDMENT TO THE CONSTITUTION

A. The "Voluntary" Proposals Are a Classic Case of Content-Based Abridgment of Commercial Speech

While the *Interagency Report* labels its proposals as voluntary, the fact that the principles were drafted by government, will be shared with Congress, and have been accompanied by explicit threats of more onerous government intervention gives the Federal Working Group's action the distinct imprimatur of government coercion. When viewed, as they must be, through the lens of a government speech restriction, the purportedly voluntary guidelines trigger the same First Amendment concerns – and constitutional scrutiny – that unquestionably would invalidate mandatory restrictions on truthful advertising. If these types of marketing restrictions were imposed pursuant to direct regulations or legislation, they plainly would be unconstitutional. In short, the notion that proposed restrictions issued by a group of regulatory agencies are intended only to guide "voluntary" conduct is an exercise in sophistry that no court would view as anything other than government action, subject to full First Amendment analysis.

In a long line of decisions, the Supreme Court has struck down restrictions on "commercial speech" that, like the Federal Working Group proposals here, are not narrowly tailored to serve a substantial governmental interest. Viacom has retained a constitutional law expert, Professor Kathleen Sullivan, to evaluate the constitutional implications of the Federal Working Group's efforts to restrict food marketing; her report is attached as Appendix A hereto.[27] In Professor Sullivan's expert opinion, "government may not regulate truthful

[27] *See generally*, Sullivan Report.

commercial speech unless its means are narrowly tailored to such objectives, a test that any effort to stop childhood obesity by regulating speech must fail."[28]

Notwithstanding the attempts in the *Interagency Report* to cloak the marketing restrictions in comforting prose through words such as "voluntary" and "guidelines," the Federal Working Group quite clearly is attempting to address its professed concern with childhood obesity through restricting lawful speech. Rather than using its considerable direct powers to address the causes of childhood obesity, which are in the proper ambit of regulation, the government instead attempts to address the issue only by limiting speech – a "violation of the basic First Amendment principle that regulation of speech, including commercial speech, should be a last, not a first, resort for government action."[29] Indeed, as Professor Sullivan explains, the "Supreme Court has long made clear that the government should not be in the business of approving or disapproving truthful commercial speech based on its content in order to protect consumers from making choices that the government views as bad for them. The Court has likewise made clear that this analysis does not change where the government aims at protecting children."[30] Professor Sullivan concludes that "[t]he government's food marketing proposal departs from all of these basic First Amendment premises."[31]

Thus, Professor Sullivan notes that David Vladeck, the director of the FTC's Bureau of Consumer Protection, has warned: "We would not be talking about government

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[28] *Id.* at 1.

[29] *Id.*

[30] *Id.*

[31] Sullivan Report at 1.

regulation if industry self-regulation had made greater strides."[32] She also points to Mr. Vladeck's admonition that if industry does not "make great strides in limiting children-directed marketing" in compliance with the Federal Working Group's proposals, Congress will "decide for all of us what additional steps are required."[33] Mr. Vladeck also threatened that the FTC would "continue to look closely at food marketing to kids."[34]

FTC Chairman Leibowitz likewise has cautioned: "[I]t's time for the entertainment industry to play a constructive role. It needs to filter the foods that are advertised on children's programming, particularly on children's cable networks. . . . [W]e will have . . . a uniform framework in place, we expect, by this summer."[35] And the FTC has shown its willingness to use its investigatory authority to demonstrate not only to advertisers, but to media companies as well, its power to influence behavior. In 2010, Viacom's Paramount and Nickelodeon businesses, for example, received multiple requests for information from the FTC, which asked detailed questions about the companies' licensing and cross-promotional arrangements.

When the government acts with the avowed purpose and predictable effect of curbing lawful speech, and especially when it uses its considerable muscle to investigate and

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[32] *Id.* at 34 (*citing* Statement of David Vladeck, Director of Bureau of Consumer Protection of Federal Trade Commission, *Sizing Up Food Marketing and Childhood Obesity*, December 15, 2009, at 261 ("*Vladeck Statement*")).

[33] Sullivan Report at 35 (*citing Vladeck Statement* at 263).

[34] *Vladeck Statement*, at 263. *See also* White House Task Force on Childhood Obesity Report to the President, *Solving the Problem of Childhood Obesity Within a Generation* (May 2010) at 31-32 ("[t]he prospect of regulation or legislation has often served as a catalyst for driving meaningful reform in other industries and may do so in the context of food marketing"; also noting that, in this context, government can "promulgat[e] laws and regulations when other methods prove insufficient").

[35] Statement of Jon Leibowitz, Chairman, Federal Trade Commission, *Sizing Up Food Marketing and Childhood Obesity*, December 15, 2009, at 9-10.

effectuate its purposes, there can be little question that its coercive inclinations are subject to First Amendment review. Professor Sullivan puts its succinctly: "A set of 'guidelines' issued by a group of regulatory agencies with enormous regulatory and investigatory power over the food and media industries that are subject to those guidelines is the functional equivalent of government action, and companies may not be required to surrender free speech protections in exchange for the 'benefit' that government refrains from regulating them directly."[36]

Under an appropriate First Amendment analysis, restrictions on commercial speech – truthful speech that proposes the sale of lawful goods or services – are subject to heightened scrutiny.[37] The Federal Working Group's proposals cannot withstand such scrutiny. First, the proposals would have a harmful impact on far more speech than is related to the government's goals. The Federal Working Group would sweep within its purview a tremendous volume of programming that is accessible to and of interest to adults as well as children. The Supreme Court repeatedly has admonished that speech restrictions cannot reduce general discourse to only that which is fit for children's consumption. Second, any causal connection between advertising and childhood obesity is far too attenuated to satisfy the strong empirical showing required for restrictions on commercial speech. Third, the government has numerous alternative, less restrictive means to achieve its objectives, rather than resorting to a ban on free speech. For these reasons, Professor Sullivan concludes, the restrictions set out in the *Interagency Report* must fail.[38]

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[36] Sullivan Report at 2.

[37] *See id.* at 7.

[38] *See id.*

Under the governing four-part test set forth by the Supreme Court in *Central Hudson Gas v. Public Service Comm'n*,[39] commercial speech that (1) promotes a lawful transaction and is not misleading may not be restricted unless the government can show that its regulation (2) serves a substantial government interest, (3) directly advances the governmental interest asserted, and (4) is no more extensive than necessary to serve that interest. In *Board of Trustees, SUNY v. Fox*,[40] the Court clarified step (4), holding that "no more extensive than is necessary" means that a regulation must be narrowly tailored to its goal, but need not be the least restrictive means of achieving it (as would be the case for a content-based regulation of noncommercial speech). The Court has invalidated virtually every commercial speech regulation challenged before it in recent decades, most often for failing either or both of steps (3) and (4).[41]

It goes without saying that the food advertising in the crosshairs of the *Interagency Report* is truthful and not misleading; not even the Federal Working Group claims otherwise. Even conceding that the government has a substantial interest in addressing childhood obesity, "such an interest may not be pursued through excessively sweeping or paternalistic means of limiting access to truthful speech, as the government attempts to do by promulgating" so-called "voluntary" guidelines.[42] Thus, the Federal Working Group cannot demonstrate that its proposed marketing restrictions meet the narrow tailoring required by steps (3) and (4).

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[39] 447 U.S. 557 (1980).

[40] 492 U.S. 469 (1989).

[41] *See* Sullivan Report at 7.

[42] *Id.* at 10.

As Professor Sullivan details, the Federal Working Group proposals fail to directly advance the government's goals. *Central Hudson*'s "narrow tailoring" analysis requires a strong empirical showing that a speech restriction "will truly and effectively advance its goal; it cannot be satisfied based merely on a conceivable or hypothetical relationship between the government's asserted end and the means of suppressing commercial speech."[43] Thus, the Federal Working Group "bears a heavy burden to demonstrate empirical support for its contentions that changes in advertising will cause changes in consumption."[44] Yet the *Interagency Report* is bereft of any attempt to draw the necessary connection. If anything, the report is all the more troubling because the government persists in focusing on speech limitations even in the face of its own studies (both the *Interagency Report* itself as well as the National Institute of Medicine) refuting a connection between advertising or obesity or, at a minimum, showing any possible connection to be highly attenuated.[45]

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[43] *Id.* at 12. The Supreme Court has repeatedly invalidated commercial speech regulations for failing to directly advance the goal of discouraging consumption of some product or service (electricity, beer, vodka, gambling, underage tobacco use), even though it has accepted that such goals are substantial. *See, e.g., Central Hudson*, 447 U.S. at 570 (ban on utility billing inserts fails to directly advance goal of decreasing electricity consumption); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995) (ban on advertising beer alcohol levels fails to directly advance goal of decreasing alcohol consumption); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (ban on alcoholic beverage price advertising fails to directly advance goal of decreasing alcohol consumption); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (ban on outdoor tobacco product advertising fails to directly advance goal of preventing minor's incentives to make illegal purchases of tobacco products); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 188-89(1999) (ban on broadcast advertising of lawful lotteries and casinos fails to directly advance goal of dampening demand for gambling).

[44] Sullivan Report at 12.

[45] *See supra*, at 3 (*citing* IOM finding "there is presently insufficient causal evidence that links advertising directly with childhood obesity and that would support a ban on all food advertising directed to children"). As Professor Sullivan explains: "To show that limiting food advertising directed at children will reduce childhood obesity would require government first to show that advertising increases children's demand for types of foods it deems 'unhealthy.'" Sullivan Report at 13. Advertising, however, is principally a form of competition among brands that redistributes market share among competitors rather than a vehicle for increasing aggregate demand for a product. "To the extent that advertising merely causes consumers to buy one brand rather than another, reducing the amount of advertising will not reduce the overall demand for a food product." *Id.* The *Interagency Report* concedes that there is no conclusive evidence that food advertising increases adolescents' demand for certain types of food. *See Interagency Report* at 17.

The Federal Working Group's proposals also are underinclusive. Even though the restrictions are wide enough in scope to portend significant harms, they still would fail to prevent children from viewing a substantial amount of marketing that falls outside the range of the *Interagency Report*. For example, while children may find attractive and comprise a sizeable portion of the audience for televised sports events or awards shows, if they do not meet the thresholds described above, the programs could carry food advertising without restriction. If food advertising is suppressed on children's programs, food manufacturers may shift advertising to adult programs, thereby increasing the overall quantity of these messages and the chance that children who are exposed to such programs will see it (while also serving to increase ads targeting parents who ultimately make choices about food consumption). Moreover, since the proposed restrictions would affect only advertising, they necessarily would not reach the wide range of fully protected speech – including the content of programming on television, movies and the Internet – that depict foods disfavored by the government in ways that may make these foods attractive to kids. In short, the Federal Working Group's plan would leave children exposed to the very messages that the *Interagency Report* condemns.[46]

Equally important, Professor Sullivan points out that the causal chain between food marketing and children's consumption habits is far too attenuated to serve as a constitutionally sound basis for policy-making. For one thing, parents serve as a significant intervening factor, with control over both their kids' financial ability to make purchases and, often, kids' physical ability to go to places that sell unhealthy food. And, just as relevant, there are a wide array of societal forces that cause childhood obesity, none of which has anything to do with food marketing. For instance, there is both greater availability and easier and more

[46] *See* Sullivan Report at 15-16.

economical access to food today. Americans also lead a more sedentary lifestyle, with a decrease in physical activity among children. Finally, the government's proposed restrictions would not affect the vast majority of foods actually consumed by American children, which are not even advertised (*e.g.*, raw ingredients purchased at a supermarket and local or store brand items); therefore restrictions on food advertising cannot be expected to have any effect on consumption with respect to such foods. Critically, from a First Amendment perspective, the Federal Working Group fails to account for these breaks in the causal chain.[47]

The proposed marketing restrictions also fail under step (4) of the *Central Hudson* analysis, as they are more extensive than necessary to serve the goal of reducing childhood obesity. As Professor Sullivan notes, while this analysis does not require the use of the least restrictive means, the Supreme Court would likely conclude that the existence of a non-speech-related means to advancing the government's interest is fatal to a speech restriction. Here, of course, the Federal Working Group could achieve the government's goals directly through food labeling. Government also could engage in a public awareness campaign or expend more resources to make healthy foods and activities available to children (*e.g.*, through healthier school lunches or increased funds for physical education). All of these options, at least from a constitutional perspective, would be preferable to speech regulation.[48]

Apart from failing to consider these alternatives, the *Interagency Report* neglects to address the extent to which its proposed speech limits would sweep in a substantial amount of programming intended for adults. As Professor Sullivan makes clear, there is a long line of

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[47] *See id.* at 16-18.

[48] *See id.* at 19-24.

Supreme Court precedent confirming that "speech deemed potentially harmful to children may not be subject to broad bans that prevent adults as well from receiving it."[49]

Nor does the *Interagency Report* take into consideration that its proposals would infringe the speech rights of creative companies such as Viacom. While the marketing restrictions may be designed to affect the activities of advertisers and food producers, the impact will be vastly more extensive. As explained above, if companies such as Viacom cannot rely upon advertising to finance program creation and distribution costs, they will be compelled to invest fewer resources in the creative process. In this regard, the Federal Working Group's efforts infringe core free speech rights – with impact well beyond the commercial messages conveyed by advertisers.[50]

Put simply, the Federal Working Group's proposals cannot withstand constitutional scrutiny.

B. Government Action That Chills Speech Also Violates the First Amendment

Professor Sullivan finds that the "coercive force" of the Federal Working Group's proposal "is evident from their purpose, form and context."[51] She observes that the restrictions "inherently carry with them the implicit threat that failure to comply on a 'voluntary' basis will result in government stepping in to enforce them or otherwise induce compliance with them,"

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[49] *Id.* at 22.

[50] *See* Sullivan Report at 24. Professor Sullivan cites the experience of the United Kingdom, which suffered from curtailment of investment in programming intended for children when regulators there (unrestrained by First Amendment speech rights) attempted to limit food advertising. "[A]dvertising is a necessary prerequisite for the free flow of programming on television and in other media – programming that itself is fully protected speech. Because the originality and quantity of programming content is dependent upon advertising revenues, any regulation that decreases advertising . . . will result in the cancellation or curtailment of valuable programming itself." *Id.* at 24-25 (noting that when British regulators severely limited television advertising to children of foods or drinks deemed high in fat, sugar or sodium, there was a substantial negative impact on broadcast revenues; "Such loss of revenue inevitably leads to the cancellation or curtailment of children's shows").

[51] *Id.* at 27.

given that the agencies represented in the Federal Working Group "hold tremendous coercive leverage over the affected industries."[52] Indeed, the *Interagency Report* was funded and mandated by Congress itself, "multiplying the pressure upon and the opportunities to pressure parties that fail to comply."[53]

Furthermore, the government-backed restrictions would "provide a powerful tool to consumers and consumer advocacy organizations that seek to pursue civil litigation against advertisers and media."[54] Advocacy groups have long demonstrated a willingness to use litigation to restrict speech with which they do not agree. The Center for Science in the Public Interest filed a notice of intent to sue Viacom and Kellogg in Massachusetts regarding food marketing practices five years ago.[55] The Federal Working Group action here would simply provide additional incentive and ability for similar suits in the future, further chilling speech.

Professor Sullivan explains that there is ample Supreme Court precedent holding unconstitutional "laws directed to altering the content of private speech in a direction favored by the government – even where the mode of censorship is informal and even where the acceptance of the speech restrictive conditions is nominally voluntary."[56] In *Bantam Books, Inc. v. Sullivan*, for instance, the Court rejected the government's argument that cooperation with a state commission was voluntary and that the plaintiff was "'free' to ignore the commission's notices,

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52 *Id.* at 28.

53 *Id.* at 29.

54 Sullivan Report at 28.

55 *See Parents and Advocates Will Sue Viacom & Kellogg*, Press Release, Center for Science in the Public Interest (dated Jan. 18, 2006) (available at http://www.cspinet.org/new/200601181.html) (last visited July 13, 2011).

56 Sullivan Report at 27.

in the sense that his refusal to 'cooperate' would have violated no law."[57] The Court noted that the government's behavior – which included issuing veiled threats of court action and other methods of intimidation (*e.g.*, follow up visits by police officers) to convince the book distributor plaintiff to discontinue providing certain books – amounted to *de facto* regulation of speech under color of state law.[58] As the Court observed, "[p]eople do not lightly disregard public officers' thinly veiled threats. . . ."[59]

The Supreme Court also has invalidated on First Amendment grounds laws that condition the receipt of government benefits upon conformity with government-prescribed speech.[60] Professor Sullivan cites, for example, *Speiser v. Randall*, in which the Court invalidated a California requirement that property tax exemptions for veterans would be available only to those veterans who swear loyalty oaths.[61] Similarly, in *FCC v. League of Women Voters*, the Court struck down a provision of the Public Broadcasting Act forbidding recipients of public broadcasting funds from "engag[ing] in editorializing," reasoning that, as in

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57 372 U.S. 58, 68 (1963).

58 *See id.*

59 *Id.* at 67. Even if the threats attendant to the *Bantam* decision were more overt than those present here, Professor Sullivan indicates that the decision sets forth the broader principle, fully applicable to the Federal Working Group proposal, that courts must "look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." Sullivan Report at 29 (*citing Bantam*, 372 U.S. at 68-69) ("It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation."); *see also Interstate Circuit v. City of Dallas*, 390 U.S. 676, 688 (1968) (invalidating a city ordinance establishing a Motion Picture Classification Board charged with labeling and licensing movies "not suitable for young persons," and holding that the ordinance was "not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression").

60 *See* Sullivan Report at 30.

61 *See id.* (*citing* 357 U.S. 513 (1958)).

Speiser, the withdrawal of funding in response to the expression of political opinion operates as a "penalty" on protected speech.[62]

Professor Sullivan explains that, "[w]hile these cases raise a number of issues different from the [Federal Working Group] proposal here, they are relevant in that they make clear that the Court will view nominally voluntary compliance with a speech-restrictive condition as no defense to the unconstitutionality of the government's imposition of that condition."[63] The Court's concern, put simply, is that government will "use the informal leverage of its subsidies to distort the terms of debate that would otherwise obtain, biasing speech in the direction favored by the government."[64] While here the government is not offering financial inducements to get companies to comply with the Federal Working Group proposals, the government nonetheless is using its leverage and its distorting effects to effectuate an "unconstitutional bargain: the government offers not to regulate food producers and advertisers and their media counterparties, in exchange for those industries acceding to a set of content- and even viewpoint based speech restrictions that would be plainly unconstitutional if imposed directly through regulation."[65]

Accordingly, Professor Sullivan concludes that "[g]overnment action undertaken with the purpose and predictable effect of curbing truthful speech is *de facto* regulation and triggers the same First Amendment concerns raised by overt regulation."[66]

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62 468 U.S. 364, 366 (1984).

63 Sullivan Report at 31.

64 *Id.*

65 *Id.* at 31-32.

66 *Id.* at 27.

VI. RESTRICTIONS ON FOOD MARKETING STEMMING FROM GOVERNMENT THREATS AND COERCION RUN AFOUL OF THE DUE PROCESS RIGHTS GUARANTEED BY THE CONSTITUTION

Separate and apart from the critical First Amendment questions posted by the *Interagency Report,* Viacom is concerned that the coercive nature of the Federal Working Group's efforts to restrict marketing tramples on the media industry's Fifth Amendment due process rights. The courts have recognized that Federal agency tactics can implicate due process concerns, particularly when agencies exercise pressure on or attempt to intimidate regulated entities.

In *MD/DC/DE Broadcasters Ass'n v. FCC,* for instance, the D.C. Circuit expressed concern that "[a] regulatory agency may be able to put pressure upon a regulated firm in a number of ways, some more subtle than others."[67] The court specifically noted that, because agencies have the power to investigate, coercive tactics are highly likely to leave regulatees with little choice but to pursue government's preferred outcome: "Investigation by the licensing authority is a powerful threat, almost guaranteed to induce the desired conduct."[68]

Likewise, in *Chamber of Commerce of the U.S. v. U.S. Dep't of Labor*, the court found that the Occupational Safety and Health Administration ("OSHA") should have conducted notice and comment rulemaking before promulgating a directive that employers in selected industries would be inspected unless they adopted "a comprehensive safety and health program designed to meet standards that in some respects exceed those required by law."[69] The Court rejected OSHA's argument that the directive simply required employers to adopt "'voluntary

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[67] 236 F.3d 13, 19 (D.C. Cir. 2001).

[68] *Id.*

[69] 174 F.3d 206, 208 (D.C. Cir. 1999).

standards,' 'industry practices,' and 'suppliers' safety standards'" and found instead that the "voluntary" nature of the directive was "but a veil for the threat" that OSHA possessed the "power to inspect."[70]

In this case, the FTC, FDA, CDC and USDA hold the same power to inspect, and the FTC has already twice sent civil investigative demands to dozens of food and beverage companies inquiring about their food marketing practices directed at children and adolescents. The FTC likewise sent requests for information on food marketing to Viacom's Paramount Pictures and Nickelodeon (and other major media companies). And the FDA and USDA directly regulate nearly every aspect of the food and beverage industry, granting both agencies tremendous leverage over major food manufacturers like General Mills, Kraft and Kellogg.

For the same reasons, the proposed food marketing restrictions, issued under the semblance of being voluntary, but coupled with veiled and not-so-veiled threats of penalty for non-compliance, strip from Viacom and other affected companies their legitimate due process rights. The Federal Working Group's efforts to govern industry behavior by issuing a "report," rather than by pursuing rules issued under some authority lawfully delegated by Congress, cannot be reconciled with the Fifth Amendment.

VII. CONCLUSION

The Federal Working Group did not "study . . . the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children." Instead, it reviewed existing nutritional standards and food marketing self-regulatory programs and private/public partnerships, then developed its own more stringent nutritional standards and determined that <u>all</u> forms of food

[70] *Id.* at 210.

marketing should be prohibited for 2-11 years olds and potentially for 12-17 year olds. Viacom urges the Federal Working Group to withdraw its "recommendation" to restrict any food marketing for adolescents, a group whose developmental maturity belies the need for paternalistic intervention. Viacom also submits that, given the lack of evidence linking advertising to childhood obesity, there is no basis for replacing self-regulatory efforts with government guidelines when it comes to children under age 12. In order to meet its Congressional mandate, the Federal Working Group must identify the scientific basis for its conclusion that marketing restrictions will reduce childhood obesity, conduct a cost-benefit analysis to understand the full impact of the restrictions on jobs, investment and charitable giving by the food and beverage, media and advertising industries, and address in more than a conclusory fashion the serious constitutional implications of the restrictions.

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July 14, 2011

APPENDIX A

The Interagency Working Group's Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts: Constitutional Issues

Kathleen M. Sullivan[1]

I. INTRODUCTION

A federal Interagency Working Group on Food Marketed to Children (IWG) has proposed for comment a detailed set of guidelines entitled *Nutrition Principles to Guide Industry Self-Regulatory Efforts* that would limit the advertising of food and drink directed at children and adolescents. It is dismaying that, rather than using its considerable regulatory and communicative powers to address the direct causes of childhood obesity, the government here instead seeks to redirect private speech in the direction favored by the government—in violation of the basic First Amendment principle that regulation of speech, including commercial speech, should be a last, not a first, resort for government action. The Supreme Court has long made clear that the government should not be in the business of approving or disapproving truthful commercial speech based on its content in order to protect consumers from making choices that the government views as bad for them. The Court has likewise made clear that this analysis does not change where the government aims at protecting children. The government's food marketing proposal departs from all of these basic First Amendment premises.

While all may agree that the government has an interest in curbing childhood obesity, courts are highly skeptical of government paternalism implemented through speech restrictions—even in pursuit of legitimate government objectives. The government may not regulate truthful commercial speech unless its means are narrowly tailored to such objectives, a test that any effort to stop childhood obesity by regulating speech must fail. Any causal

[1] Stanley Morrison Professor of Law and Former Dean, Stanford Law School; Partner, Quinn Emanuel Urquhart & Sullivan. The author has been retained by Viacom to analyze the IWG proposal discussed herein.

connection between food advertising and obesity is highly attenuated. And the government has at its disposal a wide range of obvious and practical alternative means for combating childhood obesity that restrict far less speech, or no speech at all.

The food marketing "guidelines" cannot escape full First Amendment analysis merely because styled "voluntary." A set of "guidelines" issued by a group of regulatory agencies with enormous regulatory and investigatory power over the food and media industries that are subject to those guidelines is the functional equivalent of government action, and companies may not be required to surrender free speech protections in exchange for the "benefit" that government refrains from regulating them directly.

II. BACKGROUND

A federal Interagency Working Group on Food Marketed to Children ("IWG") has proposed what it calls "Nutrition Principles to Guide Industry Self-Regulatory Efforts" that would limit the advertising of food and drink directed at children and adolescents. Interagency Working Group on Food Marketed to Children, *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts: Request for Comments*, April 28, 2011, available at http://www.ftc.gov/opa/2011/04/foodmarket.shtm ("IWG Proposal). The IWG was convened at Congress's direction under the Omnibus Appropriations Act of 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84, and is comprised of representatives from the Centers for Disease Control and Prevention (CDC), the Federal Trade Commission (FTC), the Food and Drug Administration (FDA), and the United States Department of Agriculture (USDA)—that is, by agencies with considerable coercive regulatory power over the food, beverage, restaurant and media industries.

Two basic features define the IWG's approach. *First*, the proposal expresses government approval or disapproval of food advertising directed at children based on its content. The proposal identifies ten foods as those most heavily marketed to children: "breakfast cereals; snack foods; candy; dairy products; baked goods; carbonated beverages; fruit juice and non-carbonated beverages; prepared foods and meals; frozen and chilled deserts; and restaurant foods." *Id.* at 7. The proposal approves and seeks to encourage the advertising to children of foods that "make a meaningful contribution to a healthful diet" by contributing specified amounts of "fruit, vegetable, whole grain, fat-free or low-fat milk products, fish, extra lean meat or poultry, eggs, nuts and seeds" to servings or meals. *Id.* at 8-10, 15-16. The proposal disapproves and seeks to discourage the advertising to children of foods containing more than specified amounts of "sodium, saturated fat, *trans* fat, and added sugars," *id.* at 11-14, and sets forth the disapproved amounts in highly specific detail relative to "Reference Amount Customarily Consumed," *id*. at 16.

Second, the proposal adopts broad definitions of what advertising is deemed directed at children—definitions that sweep in many adult audience members as well. The IWG proposal covers a sweeping range of marketing activities including "television, radio, and print advertising; company sponsored web sites, ads on third-party Internet sites, and other digital advertising, such as email and text messaging; packaging and point-of-purchase displays and other in-store marketing tools; advertising and product placement in movies, videos, and video games; premium distribution, contests, and sweepstakes; cross promotions, including character licensing and toy co-branding; sponsorship of events, sports teams, and individual athletes; word-of-mouth and viral marketing; celebrity endorsements; in-school marketing; philanthropic activity tied to branding opportunities; and a catch-all other category." *IWG Proposal* at 18.

The IWG proposal identifies advertising targeted at children through several means, principally quantitative definitions of audience share as set forth in a previous FTC report. Federal Trade Commission, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation, A Report to Congress* (July 2008) *available at* http://www.ftc.gov/os/2008/07/P064504foodmktingreport.pdf ("2008 FTC Report"). The 2008 FTC report, for example, defines advertising as directed at children in traditional broadcast media like television and radio if shown during any "program, programming block, or daypart that had a viewing audience consisting of 30% or more children ages 2-11," *2008 FTC Report Appendices* at B-13-14. The report defines advertising directed at children on the Internet as encompassing any "Internet website for which audience demographic data indicate that children ages 2-11 constituted at least 20% of the audience." *Id.* at B-15. Going beyond the 2008 FTC Report, the IWG proposal also addresses advertising directed at adolescents, for example prescribing healthy food advertising to any television or radio programming or Internet website that had an audience of more than 20% of children aged 12-17. *IWG Proposal* at 18.

The 2008 FTC Report also uses some qualitative measures to identify advertising directed at children, such as marketing plans revealing an intent to reach children or the use of child-oriented animated figures in packaging or websites. *2008 FTC Report Appendices* at B-15, B-18.

III. SUMMARY OF ARGUMENT

Viewed, as they must be, as tantamount to government action restricting speech, the proposed "voluntary guidelines" trigger the same First Amendment concerns that would unquestionably invalidate equivalent restrictions on food advertising through mandatory government regulation backed by coercive penalties like fines. In a long line of decisions, the

Supreme Court has invalidated restrictions on "commercial speech." Such restrictions are invalid unless narrowly tailored to serve a substantial government interest. The government interests in promoting children's health and reducing childhood obesity are substantial. But the IWG proposal is not narrowly tailored to those goals, for several reasons:

First, the IWG proposal has a harmful impact on far more speech than is related to its goals. It sweeps in a large amount of programming that is accessible to and of interest to adults as well as children, in violation of the Supreme Court's repeated holdings that speech restrictions may not protect children by reducing general discourse to what is deemed fit for children. The proposal also would have the effect of reducing the quantity of original children's programming (as well as adult programming attracting too high a share of children) by diminishing or diverting the advertising revenues upon which such fully protected forms of programming depend.

Second, any causal connection between advertising and childhood obesity is far too attenuated to satisfy the strong empirical showing required for restrictions on commercial speech. The government would be unable to adduce any substantial evidence to prove, for example, that (a) food advertising increases children's demand for certain foods rather than influencing brand choices within food types; (b) as a result of such food advertising, children will demand such foods from parents; (c) parents, who control the financial and physical means for food purchases, will accede to such demands; (d) childhood obesity results solely, or even principally, from the type rather than the amount of food consumed; (e) childhood obesity results from the amount of food consumed rather than lack of physical movement or exercise or economic or other factors.

Third, the government has numerous alternative, less speech-restrictive means to achieve its objectives, including requiring disclosure of food content (e.g., levels of sodium, saturated fat,

trans fat, and added sugars) in food labels, providing public education and government-sponsored messages about healthier childhood eating choices, and altering government subsidy policies to encourage consumption of food products that contribute to healthier childhood diets.

There is no "children's" exception to the presumptive prohibition on the regulation of speech (whether or not commercial), outside of the narrow area of obscene speech. The Supreme Court has repeatedly rejected any First Amendment carve-out for speech deemed dangerous to minors because it might induce what the government regards as harmful behavior—including in decisions invalidating outdoor tobacco advertising near schools and, most recently, invalidating a ban on sales to minors of violent video games. The government also lacks any strong empirical basis to show that children are more likely than adults to be misled by truthful ads.

Nor can the IWG proposal evade First Amendment scrutiny merely because labeled "Nutrition Principles to Guide Industry Self-Regulatory Efforts" rather than a government regulatory code. Government may not escape constitutional constraints by attaching speech-restrictive conditions to a benefit where those conditions ensure the same functional result as a prohibition of speech. Here, the government agencies that possess regulatory power over food marketing practices and consumer protection clearly aim to coerce compliance—otherwise the resources expended on this detailed regulatory regime would make no sense. Such coercion may come in a variety of forms, including implicitly threatening to regulate food marketing to children unless private companies "voluntarily" adopt government-authored standards, offering to refrain from direct regulation in exchange for private companies' surrender of speech rights, setting a standard of care that private litigants can employ, or threatening public embarrassment to advertisers or programmers who do not comply. The case for First Amendment invalidation is

strengthened by government agencies' use of regulatory leverage to impose burdensome investigations or other measures to induce compliance, as well as warnings that failure of self-regulation will lead the government to impose regulatory enforcement directly. Where the government acts, as here, with the avowed purpose and predictable effect of curbing lawful speech and applies its considerable leverage for such purposes, its nominally informal speech regulation is coercive and thus subject to First Amendment review.

IV. THE IWG PROPOSAL UNCONSTITUTIONALLY RESTRICTS COMMERCIAL SPEECH

Under the governing four-part test set forth by the Supreme Court in *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557 (1980), commercial speech that (1) promotes a lawful transaction and is not misleading may not be restricted unless the government can show that its regulation (2) serves a substantial government interest, (3) directly advances the governmental interest asserted, and (4) is no more extensive than necessary to serve that interest. In *Board of Trustees, SUNY v. Fox*, 492 U.S. 469 (1989), the Court clarified step (4), holding that "no more extensive than necessary" means that a regulation must be narrowly tailored to its goal, but need not be the least restrictive means of achieving it (as would be the case for a content-based regulation of noncommercial speech). The Court has invalidated virtually every commercial speech regulation challenged before it in recent decades, most often for failing either or both of steps (3) and (4).

Here, the targeted advertising satisfies step (1), and even though the government can satisfy step (2), the IWG proposal lacks the narrow tailoring required by steps (3) and (4).

A. The Targeted Food Advertising Is Lawful and Not Misleading

Commercial speech, unlike political or other non-commercial speech, may be regulated for containing false or misleading statements of fact; step (1) of the *Central Hudson* analysis

provides that regulation of advertising for such reasons does not trigger any heightened First Amendment scrutiny. The IWG proposal, however, does not fall within this exception. To the contrary, the IWG proposal targets the marketing of products that (unlike tobacco or alcohol) are lawful to sell even to children. And the premise of the proposed "nutritional principles" is not that the advertising is misleading. Conveying the message that food looks and tastes good does not convey any message about whether it is healthful, or desirable to consume in excessive quantities. The IWG proposal does not seek to prevent children from exposure to untrue or misleading factual claims, but instead seeks to change the content of food advertising directed at children for reason of its truthful content: according to the government, depicting food as attractive and tasty to children will induce their greater consumption of those foods, with deleterious health effects. While aimed at improving children's dietary health, the proposal does not aim at any health-related claims in any food advertising. Thus, the IWG proposal is not a regulation of unlawful or misleading commercial speech.

It is no answer to suggest that food advertisements are inherently misleading *to children*, even if not to adults, because children do not have fully developed faculties of rational choice. Some advocates of restrictions on food marketing to children have argued, for example, that young children cannot distinguish between programming and advertising, and that children are less able than adults to critically assess or resist advertisers' messages. *See, e.g.*, Jennifer L. Pomeranz, *Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Authority to Regulate*, 38 J. OF L. MEDICINE & ETHICS 98, 103-104 (2010) (arguing that advertising targeting children is inherently misleading, and thus regulation of such advertising does not even trigger *Central Hudson* because children are not able to assess the accuracy or intent of advertising messages); William A. Ramsey, *Rethinking Regulation of Advertising*

Aimed at Children, 58 FED. COMM. L.J. 361, 374-76 (2006) (seeking to draw similar inferences from selected studies and opinions). But the First Amendment does not permit speech to be regulated based on this kind of reasoning.

First, the exception for false or misleading commercial speech is designed to apply to false or misleading statements *of fact*, not to imagery designed to appeal to children's tastes or to induce in them the desire for certain foods. As J. Howard Beales, former FTC Director of Consumer Protection, has been quoted as stating, "'Kids' pestering their parents with demands for 'junk foods' may be annoying and aggravating, but it is not unfair or deceptive under the FTC Act.'" *Id.* at 374. Just as the distinction between fact and opinion is crucial in other areas of free speech protection like defamation, the distinction between fact and affective content is critical to maintain in the regulation of commercial speech.

Second, outside the area of sexually explicit speech, *see Ginsberg v. New York*, 390 U.S. 629 (1968) (holding that material not obscene as to adults may be regulated as obscene as to minors), the Supreme Court has rejected claims that speech may be regulated to prevent children from harmful influences based upon their immature psychological capacities. The most recent example is the Court's decision in *Brown v. Entertainment Merchants Association* (No. 08-1448, June 27, 2011), which invalidated as unconstitutional under the First Amendment California's prohibition of the sale or rental to minors of "violent video games," defined as games that depict "killing, maiming, dismembering, or sexually assaulting an image of a human being" in a manner offensive to prevailing community standards. In that decision, the Court declined to extend *Ginsberg*'s minors' obscenity exception to depictions of violence, instead reiterating that "'minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of

protected materials to them,'" slip op. at 7 (quoting *Erznoznik v. Jacksonville*, 422 U. S. 205, 212-13 (1975) (citation omitted)), and that government's undisputed power to protect children from harm "does not include a free-floating power to restrict the ideas to which children may be exposed," slip op at 7. *Entertainment Merchants* considered but rejected the asserted defense that violent video games could be regulated to prevent corrupting effects on minors' moral development; the argument that food advertising may be regulated to prevent corrupting effects on minor's dietary self-control fails for similar reasons.

Third, the misleading-speech exception to commercial speech protection would be distorted beyond all recognition if the attractive presentation of foods were deemed per se misleading to children

B. Government Has A Substantial Interest In Protecting Children's Health By Appropriate Means

Step (2) of the *Central Hudson* analysis asks whether government seeks to advance a substantial interest. Even if satisfied, such an interest may not be pursued through excessively sweeping or paternalistic means of limiting access to truthful speech, as the government attempts to do by promulgating the IWG's "voluntary" guidelines. There can be little doubt that government has a substantial interest in preventing childhood obesity. Thus, any First Amendment challenge to the IWG proposal will rest principally upon its invalidity under *Central Hudson* steps (3) and (4).

It might be argued that the government has no legitimate, much less any substantial, interest in interfering in children's attitudes toward food or parents' choice of what their children may eat or ask to eat on the ground that the government knows better than individuals what consumption choices are good for them. After all, the principle of First Amendment protection

for commercial speech is rooted in principles of anti-paternalism. *See Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (referring to legislative ban on advertising pharmaceutical drug prices as a "highly paternalistic approach" because it seeks to "keep[] the public in ignorance."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."). And other constitutional principles also protect against paternalistic regulation that interferes with parents' direction of their own children's upbringing. *Cf. Meyer v. Nebraska*, 262 U.S. 310 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating on substantive due process grounds regulations restricting children's education in private schools or foreign languages).

But the government concededly has a material interest in children's health and well-being apart from any interest in affecting what children know or think. It is well-settled that protecting the welfare of children is a substantial (or even in some circumstances compelling) interest. And the public health consequences of childhood and adolescent obesity, including decreased productivity or increased public expenditure on health care costs, mitigate the concern that the sole government interest here is paternalistic interference with children's processes of thought formation or parents' choices about how to rear their children.

C. Restricting Food Advertising Will Not Directly Advance Government Goals

Even assuming that the government's childhood health goals are substantial, however, the IWG proposal fails to directly advance these goals as required at step (3) of the *Central Hudson* analysis. The Supreme Court has repeatedly invalidated commercial speech regulations for failing to directly advance the goal of discouraging consumption of some product or service (electricity, beer, vodka, gambling, underage tobacco use), even where it has accepted that such

goals are substantial. *See, e.g.*, *Central Hudson*, 447 U.S. at 570 (ban on utility billing inserts fails to directly advance goal of decreasing electricity consumption); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995) (ban on advertising beer alcohol levels fails to directly advance goal of decreasing alcohol consumption); *44 Liquormart*, 517 U.S. at 507 (ban on alcoholic beverage price advertising fails to directly advance goal of decreasing alcohol consumption); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (ban on outdoor tobacco product advertising fails to directly advance goal of preventing minor's incentives to make illegal purchases of tobacco products); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 188-89(1999) (ban on broadcast advertising of lawful lotteries and casinos fails to directly advance goal of dampening demand for gambling).

This step in *Central Hudson's* "narrow tailoring" analysis demands a strong empirical showing that a restriction will truly and effectively advance its goal; it cannot be satisfied based merely on a conceivable or hypothetical relationship between the government's asserted end and the means of suppressing commercial speech. The government bears a heavy burden to demonstrate empirical support for its contentions that changes in advertising will cause changes in consumption. Where the government is unable to present "evidence that its speech prohibition will s*ignificantly* reduce marketwide consumption," the Court has not hesitated to invalidate commercial speech regulations. *44 Liquormart*, 517 U.S. at 506 (plurality opinion).

Like other commercial speech regulations that the Court has invalidated, the IWG proposal is invalid because the government cannot show that restrictions on food advertising directed at children will actually affect children's food consumption, weight or health. There are major breaks in the supposed causal chain between food advertising and childhood obesity at each stage of the analysis:

1. No Link Between Advertising and Increased Demand For Food Products

To show that limiting food advertising directed at children will reduce childhood obesity would require government first to show that advertising increases children's demand for types of foods it deems "unhealthy." Advertising, however, is frequently or even principally a form of competition among brands that redistributes market share among competitors rather than a vehicle for increasing aggregate demand for a product. *See, e.g.* Kyle Bagwell, *Introduction*, THE ECONOMICS OF ADVERTISING (Elgar 2001) (describing the history of economic analyses linking advertising to the creation of brand loyalty that decreases price-elasticity and deters market entry). To the extent that advertising merely causes consumers to buy one brand rather than another, reducing the amount of advertising will not reduce the overall demand for a food product. Limiting advertising may actually increase demand for a product by forcing producers to engage in price competition as a substitute, resulting in lower prices to consumers and an increase in consumption of certain food products served to children to the extent that they are price-elastic. And limiting food advertising to children and teens will have no effect on decreasing consumption of the large categories of food that is not the subject of that advertising at all, and therefore restrictions on food advertising cannot be expected to have any effect on consumption with respect to such foods

The IWG proposal itself concedes that it lacks conclusive evidence that food advertising increases children's demand for certain types of food. As the IWG proposal concedes, "The Institute of Medicine reported in 2006, for example, that the evidence was insufficient on whether television advertising influenced the diets of adolescents." *IWG Proposal*, at 17; *see Statement of the [Federal Trade] Commission Concerning the Interagency Working Group on Food Marketed to Children Preliminary Proposed Nutrition Principles to Guide Industry Self-*

Regulatory Efforts, April 28, 2011, at 2 ("while evidence suggests that food advertising influences the diets of younger children, the evidence is inconclusive for teenagers with regard to traditional measured media advertising"). The IWG similarly noted that it "is unaware of studies concluding whether or not" marketing in social media like Facebook and MySpace is "any more successful in affecting adolescents' food choices than traditional advertising." *IWG Proposal*, at 17.

Likewise, a widely noted 2005 Institute of Medicine report that urged curtailment of television advertising of fatty and sugary food and drinks to children admitted that "[t]he association between adiposity and exposure to television advertising remains after taking alternative explanations into account, but the research does not convincingly rule out other possible explanations for the association; therefore, the current evidence is not sufficient to arrive at any finding about a causal relationship from television advertising to adiposity." National Academy of Science, *Food Marketing to Children and Youth: Threat or Opportunity?*, available at http://www.nap.edu/catalog/11514.html, Executive Summary, at 9.

2. No Link Between Obesity And Type (Not Quantity) of Food Products

The IWG proposal targets certain types of food (breakfast cereals; snack foods; candy; dairy products; baked goods; carbonated beverages; fruit juice and non-carbonated beverages; prepared foods and meals; frozen and chilled deserts; and restaurant foods), and calls for marketing foods in those groups only if they have certain government-approved nutritional content. But unhealthy weight gain and obesity are largely driven by the *quantity* of food consumed, not by the *type* of food consumed. Any food may be harmful in certain quantities—even water can kill if consumed in excessive amounts in too short a time period. Indeed, a number of the foods targeted by the IWG proposal actually also appear on the USDA's recently-

issued “food plate” of foods the government recommends for a healthy and balanced diet, or are approved by USDA for use in the National School Lunch Program or the Special Supplemental Nutrition Program for Women, Infants, and Children (the “WIC” Program). The quantity of sugar or sodium in any particular food item cannot determine the composition of any particular child’s overall diet. Much depends upon how often and in what amounts the item is consumed and the rest of the child’s pattern of activity, not merely the nature of the product.

3. Limiting Advertising Directed At Children Is Underinclusive

The IWG Proposal targets marketing directed at children either by qualitative criteria like use of animated characters or by the share of children in the audience for programming. But children have access to a wide variety of marketing that falls outside these definitions. For example, children may watch programming targeted at adults and containing higher percentages of adults in the audience than the FTC definitions—including sports programs or other general audience programs aimed at adults but attractive to children.. To the extent that advertising of foods deemed unhealthy to children occurs in such programming, the FTC audience definition measures are underinclusive and leave children exposed to advertising of foods the IWG proposal condemns. Indeed, to the extent that such regulations cause advertisers to reduce their spending on advertising in children’s programming, they are likely to have the effect of increasing spending on ads on adult-directed programming, resulting in greater targeting at the very parents who actually purchase and control foods for their children.

Moreover, the proposed marketing restrictions, while affecting advertising in a wide range of media, are necessarily underinclusive as they cannot reach the wide range of fully protected speech—including the content of programming on television, movies and the

Internet—that depict what the government deems "unhealthy" foods in a way that may make them attractive.

4. Parental Control Determines Children's Food Consumption

A further break in the causal chain between food advertising directed at children and children's food consumption is the fact that parents, not children, control the means for food purchases both at home and in restaurants. Few children have the financial or physical ability to make unsupervised food choices. For younger children, food is selected entirely by their parents or guardians. Thus, parents' choices about what their children do or do not eat are an intervening factor that prevents any direct linkage between food advertising and effects on children's health.

The IWG proposal fails to take into account the effect of parental food choices for households or the extent to which the food that parents themselves consume (and share with their children) has the nutritional content it condemns. To the extent that parents' choices are responsible for what children eat, and that parents' choices are not influenced by ads directed at children, limiting ads in children's programming is an ineffective and underinclusive means for preventing childhood obesity. Indeed, to the extent that such regulations cause advertisers to shift from purchasing spots in children's programming to purchasing ads on adult-directed programming, they will be ineffective because they will merely induce parents to buy more allegedly "unhealthy" foods for their children.

5. Childhood Obesity Has Many Causes Other Than Food Advertising.

Because obesity in general (and childhood obesity in particular) has many causes unrelated to food advertising, diminishing food advertising will be ineffective in reducing childhood obesity. Causes of a relative increase in obesity rates include: (a) the greater affordability of prepared food relative to fresh foods; (b) the lack of availability of fresh foods in

particular geographical markets; (c) the rise in sedentary lifestyles that has accompanied technological change and a relative shift from manufacturing to services jobs; (d) the decrease in physical exercise by children and adolescents. *See* Todd J. Zywicki, Debra Holt & Maureen K Ohlhausen, *Obesity and Advertising Policy*, 12 GEO. MASON L. REV. 979, 991 (2004)("Economists have identified a variety of potential explanations for rising obesity rates. For most of these explanations, the central message is that the price of food has fallen, in terms of both money and time, and that the cost of activity has risen, in terms of money, time, and opportunity cost."); Gary Becker, *Advertising and Obesity of Children*, *available at* http://www.becker-posner-blog.com/2005/12/advertising-and-obesity-of-children-becker.html (citing studies attributing obesity increase to "the lower effective price of fat due to the development of efficient fast food outlets that save on time, and for teenagers a more sedentary use of leisure time") ("Becker Blog"); Richard Posner, *Advertising and Child/Teen Obesity—Posner's Comment*, *available at* http://www.becker-posner-blog.com/2005/12/advertising-and-childteen-obesity--posners-comment.html (noting "the increasingly sedentary character of activity in both work and the home, as a result of the shift from manufacturing to services and the growth of labor-saving devices in both the workplace and the home," a trend that "has affected children and teenagers because of the growing substitution of sedentary leisure activities for athletics"). In addition to these economic factors, increased obesity may also have been influenced by poorly constructed government nutritional recommendations such as the famous "food pyramid," which is now being replaced in conjunction with White House efforts to decrease childhood obesity. *See* W. Neuman, *Goodbye Food Pyramid, Hello Dinner Plate*, NEW YORK TIMES, May 27, 2011, *available at* http://www.nytimes.com/2011/05/28/health/nutrition/28plate.html.

Since weight gain results from an excess of caloric intake over caloric expenditure, evidence of reduced physical activity and exercise by children powerfully undermines any claim of a direct causal relationship between food advertising and childhood obesity. As a recent White House report notes, "fewer than one in five high school students meet the current recommendations of 60 minutes of daily physical activity," and teenagers "now spend more than seven hours per day watching television, DVDs, movies or using a computer or mobile device like a cell phone or MP3 player." White House Task Force Report on Childhood Obesity, Report to the President, *Solving the Problem of Childhood Obesity Within a Generation*, at 66 (May 2010). Such trends bear no relationship to food advertising. And as the 2005 IOM study itself admitted, "most of the research that relates television viewing to diet and to diet-related health does not distinguish exposure to food and beverage advertising *from exposure to television in general*." IOM Study, *supra*, Recommendations for Future Research (emphasis added). Because watching television is a sedentary activity that burns no calories, studies correlating weight gain with amounts of *television exposure* cannot prove that weight gain results from *exposure to food advertising* while watching television.

For all of these reasons, the government would be unable to show, as required by step (3) of *Central Hudson*, that the IWG proposal directly advances the goal of reducing childhood obesity. As economist Gary Becker notes, "If children nowadays are heavier because they are less physically active than they used to be, or because their parents find fast food cheap and convenient, it is difficult to see how advertising by food and beverage companies are to blame." *Becker Blog*, *supra.*

D. Limiting Food Advertising Is More Extensive Than Necessary To Serve The Goal Of Reducing Child/Teen Obesity

Step (4) of the *Central Hudson* analysis requires a regulation of commercial speech to be narrowly tailored to its goals in the additional sense that it does not sweep too broadly when effective and practical alternatives are available that restrict less speech. While this requirement does not require use of the least speech-restrictive means, the availability of less-restrictive means has been fatal to numerous commercial speech restrictions reviewed by the Supreme Court. Indeed, in some cases, several Justices have suggested that the availability of non-speech-related means to protect consumers is virtually always fatal to speech restrictions. *See, e.g, Liquormart*, 517 U.S. at 507 (noting that it is "perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance"); *id.* at 525 (Thomas, J., concurring in part) (suggesting that the government always has less speech-restrictive means than an advertising ban by which to discourage consumption, including rationing and sales restrictions). At a minimum, government must demonstrate that it has considered and rejected the efficacy of alternatives to the regulation of commercial speech. *See, e.g., Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002) (invalidating federal restriction on compounded drug advertising because the government could have banned or limited compounding directly) ("[T]here is no hint that the Government even considered these or any other alternatives. … If the First Amendment means anything, it means that regulating speech must be a last—not first—resort.").

The IWG proposal fails step (4) of the Central Hudson analysis for several reasons. It bypasses numerous obvious less speech-restrictive alternatives well within the government's control. It sweeps in too much speech to which adults are entitled to access, reducing general

discourse to what is deemed fit for children in a way that the Supreme Court has repeatedly rejected in other speech contexts. And it diminishes fully protected children's programming itself by undermining the advertising revenues on which that programming depends.

1. Less Speech-Restrictive Alternatives

The government has numerous obvious, readily available and practical alternative means by which to advance its interest in reducing childhood obesity other than limiting advertising directed at children. These include, for example, the following:

(a) Food labeling. Food products and restaurant menus are already subject to pervasive schemes of federal and state regulation that include requirements that food labeling disclose nutritional information such as caloric, carbohydrate, sodium, nutrient and fat levels. *See, e.g.*, *Central Hudson*, 447 U.S. at 570-71 (observing that more limited means of regulation include the required disclosure of more information on products). Consistent with the anti-paternalistic principles underlying commercial speech protection, the disclosure of more speech enabling greater consumer awareness and choice is always preferable to government prohibitions that presume consumers will make bad choices.

(b) Government counter-speech. Rather than restricting advertising, government always has the option to engage in its own speech. Public awareness campaigns, government-sponsored public information advertisements, prescribed nutritional awareness curricula in schools, dietary guidelines such as the recently-released "food plate," and numerous other forms of government-sponsored information could influence children's diet and encourage healthy food choices for children without controlling the content of private food advertising.

(c) Control of diet in public schools. Public school nutritional policy directly affects the food available to school-aged children and teens during the long hours they spend in school.

Providing and subsidizing healthy meals in school cafeterias are obvious means for altering child/teen food consumption that are within the control of state and local governments (subject to influence by the federal government through the distribution of education funding).

(d) Mandating, subsidizing or encouraging physical education and exercise in schools. Physical education is an aspect of school curriculum that is controlled by state and local governments and can be influenced by conditions on federal funding. Levels of participation by students in physical education classes could be increased by changes in school policy without limiting food advertising. *See* White House Report, *supra* at 65-73 (noting that schools, where children spend significant portions of their time, have numerous means to help children be more physically active during the school day).

(e) Altering government food subsidies and government food marketing. Similarly, the government could subsidize the production and marketing of food it deems healthy. The federal government subsidizes many agricultural products whose consumption in excess might harm children's health. For example, high-fructose corn syrup, whose inexpensive pricing benefits from federal agricultural subsidies, has been linked to the rise in obesity. *See* Kim Severson, *Sugar coated/We're drowning in high fructose corn syrup. Do the risks go beyond our waistline?* S.F. CHRONICLE, FEB. 8, 2004, *available at* http://articles.sfgate.com/2004-02-18/food/17412906_1_high-fructose-corn-syrup-nutritionists-food-supply. The federal government also runs elaborate marketing schemes in which it helps to advertise meat and dairy products, some of which are in some forms targeted by the IWG proposal. The government could readily alter these policies without restricting private producers' and advertisers' speech.

Any or all of these alternative forms of regulation is a readily available mechanism for changing children's and teenagers' patterns of food consumption without seeking to restrict

advertising choices by private food and media companies on the paternalistic premise that such advertising will lead readers and viewers to make bad choices.

2. Sweeping In Too Much Advertising Accessible To Adults

The IWG's proposed food marketing restrictions are also more extensive than necessary because they sweep in a wide variety of advertising that is by definition accessible to adults as well as children. Within the provisions applicable to traditional broadcast media, the target audience definitions (30% for ages 2-11 and 20% for ages 12-17) would sweep in programming that is aimed at adults but may have significant numbers of children in the audience. Adults will also make up the major part of the audience for some of the other media covered by the proposal, like advertising on Internet sites accessed by an audience of more than 20% children.

In a long line of First Amendment cases in other contexts, the Supreme Court has held that speech deemed potentially harmful to children may not be subject to broad bans that prevent adults as well from receiving it. With the exception of time-channeling of indecent speech in the broadcast media, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding sanction for indecent speech on daytime radio in violation of FCC regulations), the Supreme Court has invalidated every other restriction that has come before it that has attempted to protect children from inappropriate speech by sweeping in speech widely accessible to adults.

For example, in *Reno v. ACLU*, 521 U.S. 844 (1997), the Court struck down portions of the Communications Decency Act of 1996 that were designed to prevent minors' access to sexually explicit but non-obscene speech on the Internet, reasoning in part that those provisions prevented too much communication to adults. The Court in *Reno* noted that "we have repeatedly recognized the governmental interest in protecting children from harmful materials," but held that "that interest does not justify an unnecessarily broad suppression of speech addressed to

adults." *Id.* at 875. Similarly, in striking down a federal law barring the mailing of unsolicited condom advertisements, which the government defended in part on the ground that such materials were inappropriate for children, the Court reasoned that the advertisements were "entirely suitable for adults," and held that, "regardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox cannot be limited to that which would be suitable for a sandbox." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74-75 (1983).

Similar reasoning has extended to the advertising context in decisions that help highlight that the IWG proposal, in aiming at children, would prevent too much information from flowing to adults. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), for example, the Court invalidated, under step (4) of the *Central Hudson* analysis, Massachusetts' effort to prohibit outdoor advertising of certain tobacco products within 1,000 feet of a school or playground. While acknowledging that discouraging underage tobacco consumption "is [a] substantial, and even compelling," interest, and while six justices agreed that the outdoor prohibition directly advanced that goal, a different majority of the Court nonetheless held that the geographical sweep of the prohibition covered too many areas where adults would normally expect to have access to that advertising. Noting that "sale and use of tobacco products by adults is a legal activity" and that "tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products," *id.* at 564, the Court found the outdoor advertising regulations more extensive than necessary because, "[i]n some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers," *id.* at 562. The Court found both steps

(3) and (4) of the *Central Hudson* analysis violated by a different provision of the law barring indoor point-of-sale advertising of tobacco products any lower than five feet from the floor. *See id.* at 566 ("Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.").

3. Reducing The Quantity and Quality of Programming

The IWG advertising restrictions sweep in more speech than necessary for the additional reason that advertising is a necessary prerequisite for the free flow of programming on television and in other media—programming that itself is fully protected speech. Because the originality and quantity of programming content is dependent upon advertising revenues, any regulation that decreases advertising related to children's programming or adult programming with a 20% 12-17 year-old audience will result in the cancellation or curtailment of valuable programming itself.

The capacity of advertising restrictions to diminish children's programming in particular should not be underestimated, as experience in other nations like the UK helps to illustrate. Beginning in 2005, the British telecommunications regulatory agency Ofcom developed regulations designed to severely limit television advertising to children of foods or drinks deemed high in fat, sugar or sodium ("HFSS"). As noted in early assessments of the new restrictions by Ofcom itself, the restrictions had the potential for significant negative impact on broadcast revenues. *See* Ofcom, *New restrictions on the television advertising of food and drink products to children*, Nov.17, 2006, available at http://media.ofcom.org.uk/2006/11/17/new-restrictions-on-the-television-advertising-of-food-and-drink-products-to-children/ ("Ofcom has estimated that the impact on total broadcast revenues would be up to £39m per year, falling to around £23m as broadcasters mitigate revenue loss over time. The commercial public service broadcasters (ITV plc, GMTV, Channel 4, and five) could lose up to 0.7% of their total

revenues. Children's and youth-oriented cable and satellite channels could lose up to 8.8% of their total revenues; up to 15% of total revenues in the case of dedicated children's channels."). Such loss of revenue inevitably leads to the cancellation or curtailment of children's shows, while the effect of transferring revenue to food advertising in adult programming may tend to cause adult-oriented shows to crowd out children's programming as they become more profitable.

E. Advertising Is Not Carved Out From First Amendment Protection Merely Because Directed At Children

Nothing in this analysis changes on the ground that the IWG proposal aims to protect children. The protection of commercial speech applies as fully to regulations directed at protecting children as to regulations directed at protecting adults. As noted, in *Lorillard Tobacco,* 533 U.S. 525, the Court invalidated regulations of billboards aimed at preventing the advertising of tobacco products near schools even though the state's purpose was to protect children from being induced to make illegal tobacco purchases. And in *Bolger,* 463 U.S. 60, the Court, in invalidating a federal prohibition on the mailing of unsolicited advertisements for contraceptives, noted that the regulation "denies information to minors, who are entitled to 'a significant measure of First Amendment protection.'" *Id*. at 74 n.30 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212, (1975)).

Indeed, First Amendment protection applies just as strongly to minor as to adult audiences in every area of First Amendment law except obscenity, *see Ginsberg v. New York*, 390 U.S. at 638 (noting that, in the regulation of obscene speech, "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults" (citation omitted)). The Supreme Court just reiterated this principle forcefully in *Brown v. Entertainment*

Merchants Assoc., No. 08-1448, in which it invalidated California's ban on the sale or rental to minors of video games depicting certain specified forms of violence. The Court expressly rejected the State's effort "to create a wholly new category of content-based regulation that is permissible only for speech directed at children." Slip op. at 6. Calling any such argument "mistaken," the Court reiterated that government's power to protect children "does not include a free-floating power to restrict the ideas to which children may be exposed." *Id.* at 7. If the First Amendment does not permit the category of violent video games to be categorically removed from free speech protection merely because its consumers are children or teenagers, it surely does not permit the categorical removal from children's view of the advertising of salty, fatty or sugary foods.

Even where speech raises any special concern for minors, as in the case of sexually explicit but non-obscene speech, the Court has consistently held that the solution is parental control, not government censorship. For example, in *Reno v. ACLU*, the Court noted that parents could use filtering software to control children's access to indecent speech on the Internet. Similarly, in *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000), the Court invalidated a provision of a federal law requiring cable operators to confine sexually explicit programming to late-night hours if they could not fully scramble the signal, reasoning that parents could request their cable companies to block such channels. And *Entertainment Merchants* found that the video-game industry's voluntary rating system provided information about game content ensuring that "parents who care about the matter can readily evaluate the games their children bring home." Slip op. at 16.

The IWG proposal fails to consider the numerous ways in which parents can control children's access to food advertising they deem unhealthy, including the use of DVR or other

technology to limit the viewing of commercials or the enforcement of household rules about the amount or timing of television consumption by their children. It thus constitutes am impermissible effort to substitute state censorship for parental control.

V. THE FOOD MARKETING RESTRICTIONS ARE UNCONSTITUTIONAL EVEN THOUGH NOMINALLY VOLUNTARY

The fact that the IWG proposal is denominated "Nutrition Principles to Guide Industry Self-Regulatory Efforts"—and thus appears in the guise of a voluntary code rather than a coercive regulation with specific penalties attached—does not cure it of First Amendment infirmity. Government action undertaken with the purpose and predictable effect of curbing truthful speech is *de facto* regulation and triggers the same First Amendment concerns raised by overt regulation. Promulgation of speech-restrictive "principles" by agencies with regulatory power over the affected food, advertising and media industries (the CDC, FDA, FTC and USDA) has the functional force of coercive law. And the Supreme Court has long invalidated laws directed to altering the content of private speech in a direction favored by the government—even where the mode of censorship is informal and even where the acceptance of the speech-restrictive conditions is nominally voluntary. These concerns are underscored to the extent government officials make veiled threats that formal enforcement will follow if voluntary compliance is not achieved.

A. The IWG Proposal Is Intended To And Likely To Restrict The Flow Of Truthful Commercial Speech

The coercive force of the IWG proposed guidelines is evident from their purpose, form and context. *First*, unlike industry-drafted ratings systems or other forms of industry self-regulation, the "principles" are not self-imposed but rather set forth highly specific government-imposed criteria for what types of advertising may and may not be shown to children. It is

difficult to imagine that the government would have gone to such elaborate energy or expense to generate guidelines that were not intended and expected to change market practices.

Second, the "principles" inherently carry with them the implicit threat that failure to comply on a "voluntary" basis will result in government stepping in to enforce them or otherwise induce compliance with them. That is because, even if the government agencies represented in the working group do not announce their intent to literally enforce the "principles," these agencies hold tremendous coercive leverage over the affected industries. They can withhold regulatory approval on other matters within their jurisdiction or undertake burdensome investigations in order to induce compliance with the "principles."

Third, the "principles," by denominating and distinguishing "healthy" and "unhealthy" food advertising, provide a powerful tool to consumers and consumer advocacy organizations that seek to pursue civil litigation against advertisers and media. The government's official listing of foods deemed healthy and unhealthy for children and teens provides fodder for plaintiffs' arguments in product liability and other consumer protection actions that food advertising "causes" obesity or other deleterious health consequences. *See, e.g.*, http://www.cspinet.org/nutritionpolicy/policy_options_marketinglawsuit.html (2006 statement by Center for Science in the Public Interest of intent to sue Nickelodeon and Kellogg as part of effort to induce them "to stop marketing junk food to young children"). By increasing the threat and cost of private litigation that can use the government's pronouncements for leverage, the "principles" further exert a coercive force on advertisers and media.

Fourth, to the extent that the "principles" operate as a kind of "blacklist" or "whitelist" for disapproved and approved foods, they impose reputational consequences upon those who market disfavored foods. The government's effort to embarrass marketers of "unhealthy" food

operates as a strong inducement to advertisers and media to withdraw advertising they otherwise would have run in order to avoid negative consumer reaction.

Fifth, the IWG proposal was funded and mandated by Congress itself, multiplying the pressure upon and the opportunities to pressure parties that fail to comply.

B. The First Amendment Bars Informal Censorship

The Supreme Court has not hesitated in other speech contexts to invalidate informal government regulation of speech that induces self-censorship without actual enforcement. For example, it has invalidated states' use of obscenity review boards to label materials obscene and effectively discourage their circulation—all without engaging in actual prosecution of those materials and thus triggering all the constitutional protections that attend a criminal trial. In the leading case, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the Supreme Court struck down a state law allowing a commission to identify materials it found obscene and objectionable for sale to minors (including such materials as "Peyton Place" and "Playboy") and to send such blacklists to distributors asking for "cooperation" in limiting the materials' sale and display. Noting the trial court's finding that numerous distributors had been intimidated by these notices into withdrawing materials from sale or display, the Court rejected the state's argument that the challengers were "'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law," and instead found that the notices amounted to *de facto* regulation of speech under color of state law. *Id.* at 68.

Bantam sets forth a general First Amendment principle that the government's speech-restrictive action must be judged by their intent and foreseeable results, noting that courts must "look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Id.*; *see also id.* at 68-69 ("It

would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation."); *Interstate Circuit v. City of Dallas*, 390 U.S. 676 (1968) (invalidating a city ordinance establishing a Motion Picture Classification Board charged with labeling and licensing movies "not suitable for young persons, and holding that the ordinance was "not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression," *id.* at 688). This general aspect of the holding in *Bantam* is fully applicable to the IWG proposal.

C. The First Amendment Bars Speech-Restrictive Conditions On "Voluntary" Receipt Of Government Benefits

The Supreme Court has likewise invalidated speech-restrictive laws despite the speaker's nominally "voluntary" acquiescence. In the line of so-called "unconstitutional conditions" cases, the Court has barred government from conditioning the receipt of government benefits upon conformity with government-prescribed speech along lines that would be unconstitutional if imposed directly by coercive government regulation—even though the government need not have offered the benefit in the first place and even though the recipient is free to refuse that benefit. For example, in *Speiser v. Randall*, 357 U.S. 513 (1958), the Court invalidated a California requirement that property tax exemptions for veterans would be available only to those veterans who swear loyalty oaths. In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court invalidated a provision of the Public Broadcasting Act forbidding recipients of public broadcasting funds from "engag[ing] in editorializing," reasoning that, as in *Speiser*, the withdrawal of funding in response to the expression of political opinion operates as a "penalty" on protected speech. And in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Court invalidated a federal appropriations law barring the Legal Service Corporation from funding any

legal services organization that, in the course of representing indigent clients, made arguments challenging existing welfare laws.

While these cases raise a number of issues different from the IWG proposal here, they are relevant in that they make clear that the Court will view nominally voluntary compliance with a speech-restrictive condition as no defense to the unconstitutionality of the government's imposition of that condition. The Court's concern is that government will use the informal leverage of its subsidies to distort the terms of debate that would otherwise obtain, biasing speech in the direction favored by the government. Here, of course, the government is not offering financial inducements to companies to comply with the IWG's "nutritional principles." But the same concern with government leverage and its distorting effects applies where an otherwise unconstitutional condition is attached to a grant of regulatory permission rather than a cash grant. For example, in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), the Court invalidated as a taking without just compensation a state commission's grant of a building permit to enlarge a beachfront house on the owners' "agreement" to allow the public an easement of access across their land to get from one adjacent public beach entrance to another. Because the imposition of the easement would have been a "permanent physical occupation" amounting to a per se taking if imposed by direct regulation, the Court held that the government could not end-run the just compensation requirement by imposing such an easement as a condition of a permit—even though the state had the regulatory authority to deny the building permit altogether, and thus was in effect simply offering a regulatory subsidy in the form of declining to regulate.

Like the building permit in *Nollan,* the IWG proposal in effect offers an unconstitutional bargain: the government offers not to regulate food producers and advertisers and their media

counterparties, in exchange for those industries acceding to a set of content- and even viewpoint-based speech restrictions that would be plainly unconstitutional if imposed directly through regulation. Here as in *Nollan*, the end-run around actual regulation does nothing to limit the coercive effect of the government's prescription of what speech is and is not permissible, and here as in *Speiser*, *LWV* and *Velazquez*, the government's effort to achieve its preferred menu of permissible speech content through inducement of "voluntary" compliance does nothing to limit the distortion of the marketplace of ideas that would otherwise obtain through willing exchanges between speakers and audiences.

For these reasons, the nominally "voluntary" character of the proposed "nutritional principles" does not immunize them from First Amendment challenge.

D. The First Amendment Bars Restraint Of Speech Through Veiled Threats Of Enforcement

As *Bantam* made clear, "thinly veiled threats" of regulatory enforcement in retaliation for the exercise of free speech constitute *de facto* regulation subject to First Amendment scrutiny. The IWG proposal studiously avoids overt threats of enforcement, and some government regulators have suggested that "[a] report to Congress by an interagency working group provides no basis for law enforcement action by the FTC or by any of the other agencies participating in the Group" and thus "can't violate the Constitution." David Vladeck, *What's On the Table?*, July 1, 2011 (posting by the Director of the FTC Bureau of Consumer Protection on Business Center Blog), *available at* http://business.ftc.gov/blog/2011/07/whats-table. This comment incorrectly ignores that "[a] regulatory agency may be able to put pressure upon a regulated firm in a number of ways, some more subtle than others," *MD/DC/DE Broadcasters Ass'n v. FCC*,

236 F.3d 13, 19 (D.C. Cir. 2001), and underestimates the coercive force of the IWG agencies' use of "thinly veiled threats" as a seemingly benign substitute for enforcement.

For example, agencies represented on the IWG have considerable powers to investigate the practices of companies that market food to children and teens and to demand reporting by those companies. These powers are readily wielded to induce company compliance with the IWG's "principles." In February 2010, the FTC issued letters to various entertainment and media companies (including Viacom subsidiaries Paramount and Nickelodeon) requesting detailed information regarding the companies' character licensing and cross-promotional arrangements with food companies that market to children and teens, asking specifically whether such promotional activities applied any "nutritional standards." These letters reiterated the "recommendations" in the 2008 FTC report, *see* 2008 FTC Report, *supra*, at pp. 78-80 (recommending that media and entertainment companies, for example, "limit the licensing of their characters to healthier foods and beverages that are marketed to children, so that cross-promotions with popular children's movies and television characters will favor the more, rather than the less, nutritious foods and drinks"; "limit advertising placements on programs 'directed to children' to healthier food and beverage products"; and "incorporate health and nutrition messages into programming and editorial content")—making clear that the request was made in the shadow of the agency's regulatory authority, and could hardly be politely ignored.

Moreover, the FTC directed civil investigative demands in both 2007 and 2010 to dozens of food and beverage companies companies that market food to children and teens—demands that helped produce the data collected in the 2008 FTC Report on food marketing, which in turn provides the basis of the definitions of marketing in the IWG proposal. *See* Rich Tomaselli, *FTC Subpoenas 48 Food Companies Regarding Marketing to Kids*, ADVERTISING AGE, Sept. 1, 2010,

available at http://adage.com/article/news/ftc-subpoenas-48-food-companies-marketing-kids/145675/. Such inquiries provide unmistakable evidence that the government agencies involved in the IWG have the power as well as the inclination to use their investigatory authority to influence food marketing behavior within the media industry. *See MD/DC/DE* Broadcasters, 236 F.3d at 19 ("Investigation by the licensing authority is a powerful threat, almost guaranteed to induce the desired conduct."); *Chamber of Commerce of the U.S. v. U.S. Dep't of Labor*, 174 F.3d 206, 208 (D.C. Cir. 1999) (rejecting OSHA argument that a directive was "voluntary" where it told employers they would be inspected unless they adopted "a comprehensive safety and health program designed to meet standards that in some respects exceed those required by law," noting that this was "but a veil for the threat" that OSHA possessed the "power to inspect").

Finally, the IWG proposal bears coercive force to the extent that its constituent agencies place overt pressure on industry to adopt its "principles." As FTC Chairman Jon Leibowitz stated at a public hearing, "[I]t's time for the entertainment industry to play a constructive role. It needs to filter the foods that are advertised on children's programming, particularly on children's cable networks. ... As you're going to hear this afternoon, we will have such a uniform framework in place, we expect, by this summer. We expect Viacom to honor its commitment and others to follow their lead." Federal Trade Commission, *Sizing Up Food Marketing and Childhood Obesity*, Transcript of Proceedings, Dec. 15, 2009, at 9-10; *see id.* at 261, (Statement of David Vladeck, Director of FTC Bureau of Consumer Protection) ("We would not be talking about government regulation if industry self-regulation had made greater strides."). And as FTC Consumer Protection Bureau Director David Vladeck stated at the same hearing, industry compliance with the government's "voluntary" program is necessary to avoid overt government

regulation that might otherwise be imposed. *See id*. at 263 ("To be clear, these standards will not be regulations. They will not be binding, but we expect the food industry to make great strides in limiting children-directed marketing to foods that meet these standards. If not, I suspect that Congress may decide for all of us what additional steps are required.") (remarks of Director Vladeck).

Against this backdrop of *de facto* coercion, the nominally voluntary character of the IWG proposal is no protection against First Amendment challenge.